

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

DANNY ROMERO,
Plaintiff,
vs.
JOHN VARGO, D.O., STEVE SHELTON,
M.D.; DAVID GRAF, R.N.; TED
RANDALL, R.N., JERRY BECKER, M.D.,
Defendants.

Case No. CV07-6083-HU

FINDINGS AND RECOMMENDATION

Danny Jay Romero
8690360
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Pro se

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Attorney General
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1 HUBEL, Magistrate Judge:

2 Plaintiff Danny Romero brings this *pro se* action asserting
3 claims under 42 U.S.C. § 1983 that defendants violated his right of
4 access to the courts, violated his procedural due process rights by
5 bringing false disciplinary charges and thereby subjecting him to
6 the risk of harm from other inmates, and violated his right to be
7 free from cruel and unusual punishment by deliberate indifference
8 to his serious medical needs, i.e., failing to provide him with
9 orthopedic shoes containing metatarsal pads. Amended Complaint,
10 Claim I, "Deliberate Indifference." Romero also asserts a claim for
11 negligence. Amended Complaint, Claim II.

12 Both the § 1983 claims and the negligence claim are based
13 primarily on allegations that defendants have failed to implement
14 a doctor's order that Romero be provided shoes with metatarsal
15 pads, but there is also an allegation as part of Claim I that
16 "defendants repeatedly and systematically filed and approved false
17 and unjustified disciplinary charges, which resulted in actual
18 threats of [sic] his life from fellow inmates." Amended Complaint,
19 p. 4.

20 Defendants moved to dismiss the complaint for failure to
21 exhaust administrative remedies. See Wyatt v. Terhune, 315 F.3d
22 1108, 1120 (9th Cir. 2003). The court issued a *pro se* prisoner
23 advice order informing Romero that failure to exhaust his
24 administrative remedies could result in a dismissal of his case
25 (doc. # 32).

26 Romero responded to the motion to dismiss with representations
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1 that he had filed grievances with respect to defendants' alleged
2 failure to provide him the medically recommended shoes. Defendants
3 acknowledge that Romero filed a grievance against an entity called
4 the TLC Committee and defendant Vargo on October 28, 2006. Attached
5 to the Affidavit of Aaron Bales as Attachment 4 is a grievance form
6 submitted by Romero on October 28, 2006, addressed, "TLC/Dr.
7 Vargo." Romero has written on the grievance form that TLC and Dr.
8 Vargo have refused to follow an order from Dr. Becker for "rigid
9 sole shoes, metatarsal pad left forefoot, wide tennis shoes." Id.

10 On November 8, 2006, TLC committee member David Graf, R.N.,
11 responded to the grievance as follows:

12 As was explained to you ... the TLC committee recommends
13 that you seek your footwear from clothing. Also, you can
14 purchase arch supports from the canteen. These items were
not ordered as medically necessary, so it is up to you to
obtain them through the process described.

15 Bales Affidavit, Attachment 4. See also Bales Affidavit ¶¶ 6, 15,
16 16, 17. According to the Bales Affidavit, inmates must use a four
17 tier grievance procedure consisting of 1) a verbal or written
18 initial communication; 2) a written grievance form attaching copies
19 of inmate written communications, demonstrating attempts to
20 resolve the conflict informally; 3) an appeal to a functional unit
21 manager; and 4) an appeal of the functional unit manager's
22 decision. Bales Affidavit, ¶¶ 9-14. After filing the initial
23 grievance, Romero did not appeal the November 8, 2006 decision that
24 the footwear and arch supports were not ordered as medically
25 necessary and could be obtained by Romero from clothing and the
26 canteen. Id. at ¶ 6. The record does not show any grievances filed
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1 against defendants Shelton, Graf, Randall or Becker. Id. at ¶ 5.

2 In a one-page reply memorandum, defendants assert that Romero
3 has not exhausted his claims based on disciplinary charges and
4 access to the courts, so that "defendants will not further address
5 those claims on reply." Reply Memorandum, p. 1. Defendants state
6 that they withdraw their motion to dismiss as to Romero's first
7 claim, captioned "Deliberate Indifference," and ask that the case
8 "proceed based solely on plaintiffs' [sic] claim that defendants
9 were deliberately indifferent to his need for particular footwear."
10 Defendants request further that the court dismiss the negligence
11 claim "so that this matter may proceed to dispositive motions
12 solely as to Claim I." Id. at p. 2.

13 The Prisoners Litigation Reform Act (PLRA), 42 U.S.C. §
14 1997e(a), requires prisoners to exhaust all available
15 administrative remedies before filing an action under 42 U.S.C. §
16 1983 ("No action shall be brought with respect to prison conditions
17 under section 1983 of this title, or any other Federal law, by a
18 prisoner confined in any jail, prison, or other correctional
19 facility until such administrative remedies as are available are
20 exhausted."). In Porter v. Nussle, 534 U.S. 516, 525 (2002), the
21 Supreme Court interpreted the term "prison conditions" in the
22 context of the PLRA to mean that the PLRA's exhaustion requirement
23 applies to "all inmate suits about prison life, whether they
24 involve general circumstances or particular episodes, and whether
25 they allege excessive force or some other wrong." 534 U.S. at 532.

26 I recommend that defendants' motion to dismiss Romero's claims
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1 based on disciplinary charges and access to the courts, for failure
2 to exhaust administrative remedies (doc. # 26) be granted.
3 Defendants have requested that Romero's claim based on the
4 allegation that defendants were deliberately indifferent to his
5 need for particular footwear remain in the case, even though it
6 appears from the record Romero has not administratively exhausted
7 that claim for Vargo or any of the other defendants. I interpret
8 the defendants' request that Romero's deliberate indifference claim
9 remain in the case as a waiver by defendants of the administrative
10 exhaustion argument for this claim.

11 Defendants ask in their reply memorandum that the court
12 dismiss the negligence claim. Under the Porter case, that claim is
13 precluded for failure to exhaust administrative remedies.

14 **Conclusion**

15 I recommend that defendants' motion to dismiss (doc. # 26) be
16 GRANTED, as requested, for all claims except the claim that
17 defendants were deliberately indifferent to Romero's serious
18 medical needs.

19 **Scheduling Order**

20 The above Findings and Recommendation will be referred to a
21 United States District Judge for review. Objections, if any, are
22 due July 16, 2008. If no objections are filed, review of the
23 Findings and Recommendation will go under advisement on that date.
24 If objections are filed, a response to the objections is due July
25 30, 2008, and the court's review of the Findings and

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1 Recommendation will go under advisement with the District Judge on
2 that date.

3 Dated this 1st day of July, 2008.

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6 /s/ Dennis James Hubel
7 Dennis James Hubel
8 United States Magistrate Judge
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